PUBLIC PROSECUTOR

v.

MANSOR MD. RASHID & ANOR.

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CRIMINAL APPEAL NO: 05-57 OF 1993]
7 SEPTEMBER 1996

EVIDENCE: *Expert evidence - Chemist - Cannabis, handling by chemist - Defence did not cross-examine on or raise the issue - Whether essential for chemist to show how cannabis was kept - Whether there was break in chain of evidence.*

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in dangerous drugs - Charge of 'trafficking' founded on 'sale' or 'negotiated sale' of cannabis to agent provocateur - Definition of trafficking in s. 2 - Whether definition wide.*

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Charge of 'trafficking' founded on 'sale' or 'negotiated sale' of cannabis - Whether evidence on exclusive possession of room and custody and control of cannabis important - Whether evidence of existence of third party important.*

EVIDENCE: *Fingerprint evidence - Charge of trafficking in dangerous drugs through 'sale' - Identity of culprit required no proof - Investigating officer did not lift fingerprints - Whether failure fatal to prosecution's case.*

EVIDENCE: *Statement - Self-serving statements - Whether evidence of the facts stated therein - Whether may be admitted to show reaction or attitude of accused when he made it - Whether trial Judge should consider exculpatory statements as basis for founding an order of acquittal and discharge.*

EVIDENCE: *Agent provocateur - Whether an active agent provocateur - Whether merely an informer - Depending on facts of each particular case - Mere presence during negotiations and transactions involving cannabis - Whether an agent provocateur.*

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Whether an inflexible rule - Whether depends on circumstances of each particular*

case - Whether existence of a fact or state of things makes the existence of another fact or state of things so likely that it may be presumed to exist - Whether prosecution's failure to call witnesses were material as basis of prosecution's case was on "sale of cannabis resulting from negotiations."

EVIDENCE: *Witness - Failure of prosecution to call witness - Whether material - Whether prosecution's case affected - Charge of trafficking in dangerous drugs founded on 'negotiations for sale' and 'sale' of cannabis.*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Whether case against accused made out - Criminal Procedure Code, s. 180 - Standard of proof required - Whether met - Arulpragasan Sandaraju v. PP.*

This was the prosecution's appeal against the acquittal and discharge of the respondents who were charged with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). In holding that no *prima facie* case had been made out against the respondents at the close of the case for the prosecution, the trial Judge concluded, *inter alia*, that: (i) there was "a patent break in the chain of evidence" in respect of the handling of the cannabis by the government chemist; (ii) another person ('Amran') had access to or was in occupation of the room from which the cannabis was seized and, thus, the respondents could not be said to have exclusive custody and control of the cannabis; (iii) the prosecution's failure to call Amran or to offer him to the defence would "automatically trigger off the invocation of adverse inferences under s. 114(g) of the Evidence Act 1950" ('the EA'); and (iv) the police informer ('Cholar') was actually an active agent provocateur and, thus, the prosecution's failure to call Cholar or to offer him to the defence would attract adverse inferences under s. 114(g) of the EA.

Held:

Per Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the Court)

[1] Considering the evidence of the government chemist and the investigating officer, and in the absence of any cross-examination by the defence on the safe-keeping of the cannabis (or of any suggestion that other chemists might have meddled with the cannabis), the concern of the trial Judge, that the cannabis exhibited in Court might not be that which was seized from the house in which the respondents lived, was misplaced. There was no doubt that the cannabis that was seized and handed to the government chemist and the investigating officer was that which was produced in

Court. And when no such doubt existed, it was not essential for the government chemist to show how she kept the cannabis before returning it to the investigating officer, particularly when the defence did not even cross-examine on or raise the issue.

[2] The prosecution's case was not based on custody or control (thereby invoking the presumption of possession), or on possession of cannabis (thereby attracting the presumption of trafficking under s. 37(d) or (da)(vi) of the DDA. The prosecution founded its case of trafficking on the 'sale' or 'negotiated sale' of the cannabis to an agent provocateur. The definition of 'trafficking' in s. 2 of the DDA is wide and includes not only buying and selling but also carrying, keeping, and concealing. In the instant case, there was credible evidence that the respondents acted in concert in the sale of the cannabis to Cholar.

[3] The trial Judge had attached too much importance to the alleged existence and activities of Amran. These were of little relevance to the charge against the respondents, which was one of 'sale' or 'negotiated sale.'

[4] The trial Judge had erred in law when he faulted the investigating officer for not lifting the fingerprints off the wrappings of the cannabis and for not taking photographs of the street light in front of the said house. Where the identity of a culprit is in question or is required to be proved, fingerprint evidence will be of great significance and value. In the instant case, however, the charge alleged trafficking in the form of a 'sale' and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence, therefore, assumed little value or significance. As regards photographs, it was the events taking place inside the said house and not outside it which really mattered.

[5] The respondents' intention to flee, when considered in the light of the evidence of the sale immediately preceding it, justifiably necessitated some explanation from the respondents.

[6] The trial Judge was wrong in concluding, based on the 1st respondent's exculpatory statement, that the 1st respondent was not involved in the sale of the cannabis and that Amran had occupied the said room. A purely exculpatory or self-serving statement is not evidence of the facts stated although it may be admitted to show the reaction or attitude of the accused at the time he made it. In considering whether there was a case to answer, the trial Judge ought not to take into account such a statement as the basis for founding an order of acquittal and discharge.

[7] Whether a person is an informer or has become an active agent provocateur depends on the facts of each particular case. In the instant

case, there was no evidence that Cholar had done anything apart from being present when the negotiations and transactions involving the cannabis were struck. Consequently, Cholar was not an agent provocateur.

[8] The drawing of adverse inferences pursuant to s. 114(g) of the EA is not a matter of an inflexible rule but depends on the circumstances of each particular case. The question to consider is whether the existence of a fact or state of things makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognised mode of proving it, and the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned. In the instant case, no adverse inferences should be drawn against the prosecution for the non-production of both Cholar and Amran, at least at that stage of the trial. They were not material to the point in issue as the basis of the prosecution's case to substantiate the charge was on the "sale of cannabis resulting from negotiations."

[9] The prosecution's case was that the 'trafficking' took the form of 'negotiations for sale' and the 'sale' of the cannabis. Having regard to the definition of 'trafficking' and the evidence adduced including the evidence of the sale, the non-calling of Cholar and Amran did not affect the success of the prosecution in establishing a case under s. 180 of the Criminal Procedure Code. This was so even if the 'beyond reasonable doubt' standard of proof propounded in *Arulpragasan Sandaraju v. Public Prosecutor* were to be applied. A case against both respondents had been made out.

[Appeal allowed; orders of discharge and acquittal set aside; case remitted to High Court before same Judge for continuation of trial; and respondents to be called to enter on their defence]

*[**Bahasa Malaysia** Translation of Headnotes]*

KETERANGAN: *Keterangan mahir - Ahli Kimia - Kanabis, pengendalian oleh ahli kimia - Pembelaan tidak memeriksa-balas atau membangkitkan isu - Samada penting bagi ahli kimia menunjukkan bagaimana kanabis disimpan - Samada terdapatnya gangguan dalam rangkaian keterangan.*

UNDANG-UNDANG JENAYAH: *Akta Dadah Merbahaya 1952, s. 39B(1)(a) - Mengedar dadah merbahaya - Tuduhan "mengedar" diasaskan pada "penjualan" atau "penjualan kanabis yang dirundingkan" kepada ejen provocateur - Definasi pengedaran dalam s. 2 - Samada definasi luas.*

UNDANG-UNDANG JENAYAH: *Akta Dadah Merbahaya 1952, s. 39B(1)(a) - Tuduhan 'mengedar' diasaskan pada 'penjualan' atau 'penjualan kanabis yang dirundingkan' - Samada keterangan mengenai pemilikan eksklusif bilik dan jagaan serta kawalan kanabis penting - Samada keterangan wujudnya pihak ketiga penting.*

KETERANGAN: *Keterangan cap jari - Tuduhan mengedar dadah merbahaya melalui 'penjualan' - Identiti orang yang melakukan kesalahan tidak memerlukan bukti - Pegawai siasatan tidak menyiasat cap jari - Samada kegagalan memudaratkan kes pendakwaan.*

KETERANGAN: *Pernyataan - Pernyataan-pernyataan disampai sendiri - Samada keterangan fakta ternyata di dalamnya - Samada boleh diterima bagi menunjukkan reaksi atau sikap tertuduh - Samada Hakim perbicaraan seharusnya menimbangkan pernyataan-pernyataan yang bersifat membebaskan sebagai dasar untuk mengasaskan satu perintah pembebasan dan pelepasan.*

KETERANGAN: *Ejen provocateur - Samada merupakan ejen provocateur yang aktif - Samada hanya merupakan sebagai seorang informer - Bergantung pada fakta-fakta setiap satu kes yang khusus - Kehadiran semata-mata ketika perundingan dan transaksi yang melibatkan kanabis - Samada merupakan ejen provocateur.*

KETERANGAN: *Inferens yang bertentangan - Akta Keterangan 1950, s. 114(g) - Samada suatu kaedah yang tidak boleh dilentur - Samada bergantung pada setiap satu kes yang khusus - Samada kewujudan sesuatu fakta atau keadaan perkara menjadikan kewujudan fakta yang lain atau keadaan perkara-perkara lain yang besar kemungkinan ianya mungkin dianggap sebagai wujud - Samada kegagalan pihak pendakwaan untuk memanggil saksi penting kerana asas kes pendakwaan adalah terhadap "penjualan kanabis hasil daripada perundingan."*

KETERANGAN: *Saksi - Kegagalan pihak pendakwaan memanggil saksi Samada penting - Samada kes pendakwaan terjejas - Tuduhan pengedaran dadah merbahaya diasaskan atas "perundingan untuk jualan" dan "penjualan kanabis".*

PROSEDUR JENAYAH: *Pendakwaan - Penamatan pendakwaan - Samada kes terhadap tertuduh direka - Kanun Prosedur Jenayah, s. 180 - Standard bukti diperlukan - Samada dipenuhi - Arulpragasan Sandaraju lwn. Pendakwa Raya.*

Ini merupakan rayuan pihak pendakwaan terhadap pembebasan dan pelepasan responden-responden yang telah dituduh mengedarkan dadah merbahaya di

bawah s. 39B(1)(a) Akta Dadah Merbahaya 1952 (DDA tersebut). Dalam memutuskan bahawa tidak terdapat kes *prima facie* yang telah dibentuk terhadap responden-responden pada penyelesaian kes bagi pendakwaan, Hakim perbicaraan memutuskan, antara lain, bahawa: (i) telah berlaku "a patent break in the chain of evidence" berhubung dengan pengendalian kanabis oleh ahli kimia kerajaan; (ii) seorang yang lain ('Amran') mempunyai akses kepada atau menghuni bilik daripada mana kanabis tersebut telah dirampas dan, dengan itu, responden-responden tidak boleh dikatakan mempunyai jagaan dan kawalan eksklusif akan kanabis tersebut; (iii) kegagalan pihak pendakwaan untuk memanggil Amran atau untuk menawarkannya kepada pembelaan akan "automatically trigger off the invocation of adverse inferences under s. 114(g) of the Evidence Act 1950" ('EA tersebut'); dan (iv) informer polis ('Cholar') adalah sebenarnya seorang ejen provocateur yang aktif dan, dengan itu kegagalan pihak pendakwaan untuk memanggil Cholar atau menawarkannya untuk pembelaan akan menarik inferens yang bertentangan di bawah s. 114(g) EA tersebut.

Diputuskan:

Oleh Chong Siew Fai HB (Sabah & Sarawak) (menyampaikan penghakiman Mahkamah):

[1] Dalam mempertimbangkan keterangan ahli kimia kerajaan dan pegawai yang menyiasat, dan dalam ketiadaan sebarang pemeriksaan balas oleh pihak pembelaan berhubung dengan penjagaan kanabis (atau berhubung dengan apa-apa saranan bahawa ahli-ahli kimia yang lain mungkin telah mengusik kanabis itu), kebimbangan Hakim perbicaraan, bahawa kanabis yang telah diekshibitkan dalam Mahkamah mungkin bukan yang telah dirampas daripada rumah di mana responden-responden telah mendiami, telah disalah-letak. Tidak terdapat keraguan bahawa kanabis yang telah dirampas dan diserahkan kepada ahli kimia kerajaan dan pegawai penyiasat adalah kanabis yang telah dikemukakan dalam Mahkamah. Dan apabila keraguan yang sedemikian tidak wujud, maka ianya tidak penting bagi ahli kimia kerajaan itu untuk menunjukkan bahawa beliau telah menyimpan kanabis itu sebelum mengembalikannya kepada pegawai penyiasat, khususnya apabila pihak pembelaan tidak sekali pun memeriksa-balas atau membangkitkan isu itu.

[2] Kes pendakwaan bukannya berdasarkan penjagaan atau kawalan (yang dengan itu merujuk kepada tanggapan pemilikan), atau pemilikan kanabis (yang dengan itu menarik tanggapan mengedar dadah di bawah s. 37(d) atau (da)(vi) DDA. Pendakwaan mengasaskan kes mengedarnya di atas "penjualan" atau "penjualan kanabis yang dirundingkan" kepada seorang ejen provocateur. Definasi "mengedar" dalam s. 2 DDA adalah luas dan

termasuk bukan sahaja pembelian dan penjualan tetapi juga membawa, menyimpan dan menyembunyikan. Dalam kes semasa, terdapat keterangan yang boleh dipercayai bahawa responden-responden telah bertindak bersepadu dengan penjualan kanabis kepada Cholar.

[3] Hakim perbicaraan telah menaruh kepentingan yang keterlaluan kepada kewujudan dan aktiviti-aktiviti Amran yang dikatakan. Hal ini hanya mempunyai perkaitan yang tidak sebegitu penting kepada tuduhan terhadap responden-responden, yang mana adalah sesuatu mengenai 'penjualan' atau 'penjualan yang dirundingkan'.

[4] Hakim perbicaraan telah tersalah di sisi undang-undang apabila beliau menyalahkan pegawai penyiasat kerana tidak mengambil cap jari pada bungkusan kanabis dan kerana tidak mengambil gambar lampu jalan di hadapan rumah tersebut. Di mana identiti orang yang melakukan kesalahan dipersoalkan atau dikehendaki supaya dibuktikan, keterangan cap jari adalah amat penting dan bernilai. Dalam kes semasa ini, namun begitu, tuduhan mendakwa pengedaran dalam bentuk "jualan" dan terdapat keterangan yang menunjukkan identiti pesalah-pesalah yang dikatakan serta transaksi jualan tersebut. Keterangan cap jari dengan itu mempunyai nilai atau kepentingan yang agak kecil. Berhubung dengan gambar pula, ianya merupakan peristiwa-peristiwa yang berlaku di dalam rumah dan bukannya di luar rumah yang mana adalah lebih bermakna.

[5] Niat responden untuk beredar, ketika dipertimbangkan dalam keterangan penjualan yang sejurus sebelum itu, secara wajarnya menyebabkan penjelasan perlu diberikan oleh responden.

[6] Hakim perbicaraan adalah salah dalam memutuskan, berdasarkan pernyataan pembebasan responden pertama, bahawa responden pertama tidak terlibat dalam penjualan kanabis dan Amran telah menghuni bilik tersebut. Pernyataan kebebasan dan yang menjelaskan maksudnya yang tersendiri bukannya merupakan keterangan fakta-fakta yang dinyatakan walaupun ianya mungkin diakui sebagai menunjukkan reaksi atau sikap tertuduh pada waktu beliau membuatnya. Dalam menimbangkan samada terdapatnya suatu kes untuk dijawab, Hakim perbicara tidak seharusnya mengambilkira pernyataan yang sedemikian sebagai dasar bagi mengasaskan sesuatu perintah pembebasan dan pelepasan.

[7] Samada seseorang merupakan informer atau telah menjadi seorang ejen provocateur yang aktif bergantung pada fakta-fakta setiap satu kes yang khusus. Dalam kes semasa ini, tidak terdapat keterangan bahawa Cholar telah melakukan sesuatu melainkan daripada hadir ketika perundingan dan transaksi yang melibatkan kanabis tersebut berlaku. Akibatnya, Cholar tidak merupakan seorang ejen provocateur.

[8] Pengeluaran inferens yang bertentangan selaras dengan s.114(g) EA bukannya merupakan hal-perkara kaedah yang tidak diubah tetapi sebenarnya bergantung pada keadaan setiap satu kes yang khusus. Persoalan yang harus dipertimbangkan adalah samada kewujudan sesuatu fakta atau keadaan barang menjadikan kewujudan suatu fakta atau barang yang lain amat berkemungkinan hinggakan ianya boleh dianggapkan sebagai wujud. Jawapannya mestilah berubah menurut keadaan, sifat fakta yang perlu dibuktikan dan kepentingannya dalam kontroversi itu, cara yang diiktirafkan untuk membuktikannya yang biasa, dan keterangan yang meyakinkan serta sifat, kualiti yang masih belum dikemukakan dan kemudahannya mempengaruhi pihak yang berkenaan. Dalam kes semasa ini, inferens yang bertentangan tidak seharusnya dikeluarkan terhadap pihak pendakwaan kerana tidak mengemukakan kedua-duanya Cholar dan Amran sekurang-kurangnya diperingkat perbicaraan. Mereka tidak penting kepada perkara yang menjadi isu kerana dasar kes pendakwaan mempertahankan tuduhan tersebut adalah atas "penjualan kanabis hasil daripada perundingan."

[9] Kes pihak pendakwaan adalah bahawa "pengedaran" telah berlaku dalam bentuk perundingan untuk penjualan dan penjualan kanabis itu. Berhubung dengan definasi pengedaran dan keterangan yang dikemukakan termasuk keterangan penjualan itu, perbuatan tidak memanggil Cholar dan Amran tidak menjejaskan kejayaan pihak pendakwaan dalam menentukan sesuatu kes di bawah s. 180 Kanun Prosedur Jenayah. Keadaan ini adalah sedemikian walaupun jika standard membukti "beyond reasonable doubt" yang dikemukakan dalam *Arulpragasan Sandaraju v. Public Prosecutor* dipakai. Suatu kes terhadap kedua-dua responden telah pun dibuat.

[Rayuan dibenarkan, perintah pelepasan dan pembebasan diketepikan; kes dimasukkan semula ke Mahkamah Tinggi di hadapan Hakim yang sama untuk sambung bicara; dan responden hendaklah dipanggil untuk memasukkan pembelaan mereka]

Cases referred to:

PP v. Adetunji Adeleye Sule [1993] 4 CLJ 173 ***(refd)***
Su Ah Ping v. PP [1980] 1 MLJ 75 FC ***(refd)***
Abdul Jalil bin Abdul Satar v. PP [1991] 2 CLJ 1089 SC ***(dist)***
PP v. Mohamed Halipah [1982] 1 MLJ 155 ***(refd)***
PP v. Tahir bin Kassim [1985] 1 MLJ 381 ***(refd)***
PP v. Manoharan a/l Ratnasamy [1989] 1 MLJ 504 ***(cit)***
Tan Geok Hock v. PP [1989] 3 MLJ 162 ***(cit)***
Lee Chee Ming v. PP [1992] 1 CLJ 345 ***(dist)***
Pang Chee Meng v. PP [1992] 1 CLJ 39 ***(dist)***
Choo Chang Teik & Anor. v. PP [1991] 3 CLJ 2387 ***(dist)***
PP v. Chan Kim Choi [1989] 1 MLJ 404 ***(refd)***

Chan Kim Choi v. PP [1991] 1 MLJ 260 CCA ***(refd)***
R v. Storey (1968) 52 Cr. App. R 334 CA ***(aff)***
Namasiyiam & Ors. v. PP [1987] 2 MLJ 337 ***(dist)***
Munusamy v. PP [1987] 1 MLJ 492 SC ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 2, 37, 37(d), 37(da), 37(da)(vi), 37(1)(d), 37(1)(da), 39B(1)(a), 40, 40(1), 40A
Evidence Act 1950, ss. 27, 114(g)

[Appeal from High Court Malaya, Taiping; Criminal Trial No: 58-10-92]

For the appellant - Kamaruzaman bin Ab. Jalil, DPP
For the first respondent - V. Sithambaram
For the second respondent - Gurbachan Singh

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

This is an appeal by the prosecution against the order of acquittal and discharge of the two respondents at the close of the case for the prosecution.

The two respondents together with another person were charged in the High Court at Taiping with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge worded in Bahasa Malaysia may be translated into English as follows:

> That you jointly on 31 July 1991 at about 1.30a.m. in a house numbered 129, Jalan 17, Taman Kuning Sari, Taiping in the district of Larut and Matang in the state of Perak Darul Ridzuan did, on your own behalves, traffic in dangerous drug, to wit, 902 grammes of ganja in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and thereby committed an offence punishable under s. 39B(2) of the said Act read with s. 34 of the Penal Code.

After hearing the evidence of 13 prosecution witnesses and the submissions of Counsel, the learned trial Judge ordered the acquittal and discharge of the three accused without calling for their defence. Against the said order, the Public Prosecutor appeals but only in respect of the 1st and the 2nd accused (the 1st and 2nd respondents in this appeal).

The Prosecution's Case

The evidence adduced by the prosecution may be briefly summarised as follows.

Following a tip from an informer on 17 July 1991, PW8, ASP Badaruddin bin Hj. Zafari, officer-in-charge of the drug prevention unit, Taiping, directed PW9 Detective-Corporal Busra bin Abdul Kadir to investigate the authenticity of the information that a drug syndicate was operating in the district of Lenggong and Taiping in Perak. To facilitate the investigation, PW8 set up a rendezvous between PW9 and the informer (later identified as Cholar) on 18 July 1991 @ 3.15p.m. Both Cholar and PW9 then left for Lawin, Lenggong at 3.30p.m. on the same day where, according to PW9, he (PW9) was introduced to the 2nd respondent Ideris by Cholar with the words "kita satu line". When PW9 revealed his wish to purchase ganja, the 2nd respondent told him that he had no supply with him at that material time and that the cannabis was with his partner in Taiping. The 2nd respondent promised to introduce PW9 to his partner.

On 22 July 1991 @ 9.30p.m. PW9 was taken to a house No. 129, Jalan 17, Taman Kuning Sari, Taiping where he was introduced by the 2nd respondent to the 1st respondent, Mansor. PW9 further testified that on this occasion he also saw an unidentified Malay man who was not introduced to him. At this meeting PW9 managed to purchase one kati of ganja at the price of RM1,000 from the 1st respondent. PW9 also agreed to return to buy another two kilos of ganja at RM1,500 per kilo and the 1st respondent suggested the delivery to be on the night of 31 July 1991 in the same house.

Being informed of the new development, PW8 swung into action. About 15 minutes past midnight on 31 July 1991 PW8 and his men were already in position. They hid behind some bushes in front of the said house. Two kept vigilance at the back entrance of the house and another two were placed at the entrance of the road leading from Jalan Besar Taiping Changkat Jering to Taman Kuning Sari.

According to PW8, when they took their ambush position the house was lighted but empty, and the front portion of the house was also illuminated by a street lamp. PW8 said from his position he could see the house clearly and that at around 12.45a.m. he saw a Toyota Corolla car with registration plate No. BBD 7216 pulling up to the house compound. Two men alighted and entered the house. Five minutes later PW9, the 2nd respondent and Cholar arrived in a car which was parked in front of the house but outside the compound.

PW9 said when they arrived at the house, the 1st respondent and the 3rd accused Khasim were already inside. After 35-40 minutes of drinks and casual conversation, PW9 asked the 1st respondent about the two kilos of ganja promised to him earlier. The 1st respondent replied that he only had one kilo and quoted RM1,500 for its price which PW9 accepted. When PW9 expressed his intention to inspect the merchandise, the 1st respondent allegedly told the

2nd respondent in Kedah dialect, "Deris, pi siapkan barang." whereupon the 2nd respondent got up, went to a room marked 'K' in the sketch-plan P23 and came out about 15-20 minutes later with a packet wrapped in newspaper. PW9 opened the packet in the presence of Khasim and Cholar and saw a slab of compressed plant material which was further wrapped in white (transparent) plastic with yellow loytape. After that Khasim left for the bathroom. As planned, PW9 asked Cholar to get the money from his car outside, and when Cholar was a safe distance away, PW9 excused himself to go to the toilet and pressed his car alarm as a signal for his colleagues to move in, which they did. PW8 and his men rushed in through the front door, identified themselves as the police and told the two respondents not to move, which the two respondents ignored and began to flee. The 1st respondent, however, made no headway as he was soon over-powered. The 2nd respondent managed to get to the door but his success was short-lived as he was soon arrested.

During the operation, PW8 also seized, *inter alia*, the compressed plant material wrapped in newspaper, two sets of house keys, the car keys in respect of the Toyota car and a brown clutch bag, containing RM3,691. This last item was seized in the room from which the ganja was taken out.

Back at the police station, the two respondents and the exhibits seized were handed over to the investigating officer of this case, Inspector Suhaimi bin Hashim (PW13) at about 3.30a.m. on the same day who kept all the exhibits (except the car) in a steel cabinet in his room. At 2p.m. on the same day, PW13 took out the packet of ganja and had photographs taken of it (P11A and P11B) after which he sealed the packet with a PDRM'92 seal and put it back in the steel cabinet. The following day (1 August 1991) at about 2p.m. he sent the packet of ganja to the government chemist, Lam Yoke Ching (PW1).

Before the packet was handed over to PW1, Noraini bin Aziz (PW12) a clerk in the Chemistry Department, Ipoh, registered the packet as (IP) 7458/91 and this number was written on the packet. After registration the packet was handed back to PW13 who then brought it to see PW1. PW1 acknowledged receipt of the packet by issuing PW13 with receipt (P9). After the analysis by PW1 it was confirmed that the compressed plant material in the packet was cannabis having a net weight of 902 grammes.

Findings of the Learned Trial Judge

In holding that no *prima facie* case had been made out against the two respondents, the learned trial Judge gave the following reasons:

(i) The chain of evidence in respect of the cannabis

The learned trial Judge held that there was no evidence as to how PW1 handled the cannabis from the time she received it from PW13 till the time it was handed back to the latter – a period of two months 17 days from 1 August 1991 to 18 October 1991, that there were, at the material time, nine chemists in the Chemistry Department and that the possibilities of other chemists working in the same laboratory and of a mix-up of cannabis in this case with those of other cases could not be ruled out since there was no evidence where the cannabis in this case was kept and whether under lock. The learned trial Judge therefore expressed doubt whether the cannabis produced in this case was the very cannabis seized by PW8 from the living room in house No. 129, and he found that there was "a patent break in the chain of evidence."

(ii) Exclusive Possession of room 'K', and custody and control of the cannabis therein

The learned trial Judge held that Amran was given keys to the house No. 129 by PW7 Azian and that Amran occupied the room "K" of the house as reflected in the cautioned statement of the 1st respondent (D. 25). He concluded that Amran had access or occupation of the premises and the two respondents and the 3rd accused (since acquitted) could not be said to have exclusive custody and control of the drugs found in the room 'K'.

The learned trial Judge then accepted that the 2nd respondent was in "manual possession" of the cannabis and was therefore deemed to be in possession of the drug unless the contrary was proved (s. 37(d) of the Act). While conceding that an accused's conduct, demeanour and cautioned statement, if any, might be taken into account in considering the weight to be accorded to the defence citing *PP v. Adetunji Adeleye Sule* [1993] 4 CLJ 173; [1993] 1 AMR 991 in support, he ruled that (to use his own words) "the serious break in the chain of evidence in regard to the cannabis while they were in the hands of the government chemist, would entitle the three accused persons to an acquittal without their defence being called at all."

(iii) The role played by the informer, Cholar

The learned trial Judge was of the view that the role played by Cholar was more than that of an informer and disentitled him to the statutory protection under s. 40(1) of the Act. Based on the evidence that Cholar introduced PW9 to the 2nd respondent on 18 July 1991, accompanied

and witnessed PW9 purchasing one kati of ganja from the 1st accused on 22 July 1991 in the house No. 129, and again accompanied and was present throughout the discussion between the 1st respondent and PW9 regarding the purchase of the cannabis (subject-matter of this offence) on 31 July 1991 in the said house, the learned trial Judge said "the informer participated in the trap set up by Badaruddin which eventually led to the arrest of the three accused persons and the seizure of the drugs." Thus the learned trial Judge said that Cholar was not just an informer but an active agent provocateur, and that failure by the prosecution to call or offer Cholar to the defence would give rise to adverse inference under s. 114(g) of the Evidence Act 1950.

(iv) Amran – Section 114(g) of Evidence Act 1950

The learned trial Judge found in evidence that PW7 Azian, was a neighbour entrusted by the owner of the house No. 129 (PW5) to look for tenants and that a person called Amran handed her RM240 being the three months' rental in advance. According to PW7, Amran obtained the money from the 1st respondent and handed it to her. She then handed the keys of the house to Amran. PW13, the investigating officer, agreed that the name Amran cropped up in the investigation. The exculpatory statement of the 1st respondent (D25) also mentioned about Amran. The learned trial Judge accordingly held that there was such a person by the name of Amran and that failure to call or offer him "would automatically trigger off the invocation of the adverse inference under s. 114(g) of the Evidence Act.

(v) Unsatisfactory features

The learned trial Judge considered the following as having grave adverse effect on the prosecution's case:

(1) that no fingerprint on the wrappers and loytape of the ganja and no fingerprints of the respondents were lifted and taken;

(2) that no photograph was taken of the street lights in relation to the house, nor were such street lights shown on the sketch plan; and

(3) that no clothing or personal effects in room 'K' of the said house in which the offending drugs were found was taken to prove the exclusive use of the room 'K' by the first accused and of the house by the three accused in view of the evidence of PW7 that she handed the keys of the house to Amran.

The Appeal

Before us, the learned Deputy Public Prosecutor raised five grounds of appeal:

(1) that the learned trial Judge erred in law and in fact when he held that there was a break in the chain of evidence pertaining to the seized cannabis;

(2) that on the proof of custody and control of the cannabis in question, the learned trial Judge erred in law and in fact when he failed to give due consideration to the evidence and the role of the "Agent Provocateur" PW9 (Detective-Corporal Busra), but took into account such irrelevant factors as:

(a) that Amran had "access" or "occupation" of the said house;

(b) that Amran obtained the rental from the 1st respondent to give to Azian (PW7);

(c) failure of the investigating officer (PW13) to take the fingerprints on the newspaper, 'plastik putih' and the loytape;

(d) failure to take photograph of the street light; and

(e) the consideration given by the learned trial Judge to the cautioned statement of the 1st accused (1st respondent);

(3) that the learned trial Judge erred in law and in fact in ruling that there must be "exclusive use of the room 'K' in P23" (where the drug was taken) to prove the charge of trafficking in this case;

(4) that the learned trial Judge erred in law and in fact in invoking the presumption of adverse inference under s. 114(g) of the Evidence Act 1950 without giving due consideration to the overall evidence in this case;

(5) that the learned trial Judge erred in law and in fact in failing to take into consideration the fact that the 1st and the 2nd respondents tried to escape when PW8 (ASP Badaruddin) identified himself as police officers and told them not to move. This fact together with the rest of the evidence adduced as a whole established a *prima facie* case against the two respondents.

We shall now consider the grounds of appeal.

Re Ground (1) of Appeal (Break in Chain of Evidence)

The evidence adduced by the prosecution clearly establishes the various stages of the handling of the cannabis from the time of its seizure to the time it was produced in Court. What preyed on the mind of the learned trial Judge was the lack of evidence as to the manner the cannabis was kept in the Chemistry Department while in the custody of PW1, the Government Chemist. With respect, such concern is, in our view, unwarranted. PW1 had clearly shown in her testimony that after receiving the cannabis from the police she subjected it to various standard tests which confirmed the presence of cannabinoids, the active constituents in cannabis resin. In order to facilitate her examinations she broke up the slab of cannabis and after the tests were completed she put the remainder of the cannabis, which by then was in loose form, in a transparent plastic packet marked with the laboratory number (IP) 7458/91. She then signed on it and thereafter she heat-sealed the said packet. She further re-wrapped this packet, the original plastic sheet, the loytape (P7 and P7A) and the newspaper (P6) in which the cannabis came, in the same brown paper that the police used to wrap the exhibit when it was first handed to her. This brown packet was then tied with a string and then sealed with the Chemist Department's seal: "Jabatan Kimia Ipoh 2." It is important to note that the three seals, both on the brown paper and on the transparent plastic packet were found to be intact at the trial and were only broken by PW1 in Court on the day she gave testimony. The evidence of the Chemist PW1 had clearly shown that the cannabis which Inspector Suhaimi bin Hashim PW13 handed to her for analysis was the very cannabis she wrapped up with P8, P7A, P7 and P6 after analysis, and then returned it to PW13. She also identified them in Court. PW13 also confirmed that was the packet he received back from PW1.

Having regard to the evidence of PW1 and PW13 and in the absence of any cross-examination by the defence about the safe-keeping of the cannabis and any suggestion of other chemist or chemists meddling with it, the concern of the learned trial Judge that the cannabis exhibited in Court might not be the same as the one seized from the house in which the respondents lived is, in our view, misplaced. On the evidence adduced, there cannot be any doubt that the cannabis seized and handed to PW1 and PW13 was the cannabis produced in Court in this trial. When no such doubt existed, it was not essential for PW1 to show how she kept the cannabis before returning it to PW13, particularly when the defence did not at all cross-examine on or raise the issue. More pertinent to the instant ground of appeal, we are of the clear view that no question of "break in the chain of evidence" arises. In *Su Ah Ping v. PP* [1980] 1 MLJ 75 FC, Suffian LP said:

> The complaint before us was not that there had been no proof that the exhibits were serviceable, but simply that there was a "break in the chain of evidence", and the prosecution should have called as witnesses all the officers through whose hands the exhibits passed from Inspector Takbir to the armourer and back to the Inspector. We do not think there is merit in this point. The question was whether the exhibits the Inspector produced were the guns and ammunition he found at the scene, and as when he produced them as those very guns and ammunition there was no objection by the defence, it would have been a waste of judicial time to call all the intervening handlers. In our experience much judicial time is spent unnecessarily, notably in subordinate Courts, in ensuring no break in the chain of evidence. In our judgment, if the officer who picked up an object at the scene produced it and identified it as that very object, that is enough, and there is no need to call every other officer who handled it.

Learned Counsel for the 2nd respondent relied on *Abdul Jalil bin Abdul Satar v. PP* [1991] 2 CLJ 1089 SC. With respect, that case is clearly distinguishable. There, the L/Corporal who delivered the cannabis to the chemist and subsequently collected it back from the latter was not called to testify, and on the evidence there was doubt respecting the identity of the cannabis produced in Court as being that seized from the appellant's premises.

We would deal with grounds (2) and (3) of the appeal together.

Having regard to the evidence of this case, it is our view that the learned trial Judge was unduly concerned with the exclusivity of possession of the room "K" and the custody and control of the cannabis in question in relation to Amran. It is essential to bear in mind that the case of the prosecution was **not** based on custody or control thereby invoking the presumption of possession, or on possession of 200 grammes or more cannabis thereby attracting the presumption of trafficking under s. 37(d) or (da)(vi) of the Act. The prosecution founded its case of trafficking on the 'sale' of the cannabis to PW9, the agent provocateur.

Section 2 of the Act defines "trafficking" thus:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug;

Hence the definition of "trafficking" in the Act is wide and includes not only buying and selling but also carrying, keeping and concealing.

In the instant case under appeal, there is more than credible evidence from the testimony of PW9 that the respondents acted in concert in the sale of the cannabis to him. The negotiation to buy ganja on the first occasion was spearheaded by the 2nd respondent who told PW9 that his partner had ganja. PW9 was later introduced to the 1st respondent.

It is in evidence that on 31 July 1991 in the house No. 129 there was discussion between the 1st respondent and PW9 about the supply of ganja, the 1st respondent told PW9 of the inadequacy of supply and that he (the 1st respondent) had only one kilo of ganja and the price was RM1,500. PW9 having agreed to the price, the 1st respondent directed the 2nd respondent in Kedah dialect: "'Deris, pi siapkan barang." The 2nd respondent then went to room 'K' and took out the package of cannabis. All these constitute clear evidence of sale or supply within the definition of "trafficking". See *PP v. Mohamed Halipah* [1982] 1 MLJ 155 where the charge of trafficking was on sale of drugs, and, apart from the admission in the cautioned statement, the material facts were, to a significant extent, similar. *PP v. Tahir bin Kassim* [1985] 1 MLJ 381 is another case involving the element of negotiation for sale of dangerous drug. Mohamed Dzaiddin J (as he then was) found that the defence had not, on balance of probabilities, cast any doubt on the truth of the prosecution's case, "about the negotiation for the sale of drug by the accused ...". See also *PP v. Manoharan a/l Ratnasamy* [1989] 1 MLJ 504; *Tan Geok Hock v. PP* [1989] 3 MLJ 162. All these cases, it must be noted, dealt with situations after the close of the defence case.

The learned trial Judge relied on *Lee Chee Ming v. PP* [1992] 1 CLJ 345; [1992] 1 SCR 1, *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 2 SCR 483, and *Choo Chang Teik & Anor. v. PP* [1991] 3 CLJ 2387; [1992] 1 SCR 475. With respect, those cases are of no assistance. Unlike the present case under appeal where the thrust of the prosecution contention is negotiated sale, those cases related, *inter alia*, to the questions of exclusivity or otherwise of the use or possession of rooms in which the drugs were found and knowledge of the drugs upon which applicability of presumptions under s. 37 of the Act (in *Lee's* case and *Choo's* case, *supra*) or applicability of s. 27 of the Evidence Act 1950, (in *Peng's* case, *supra*) depended. None of the three cases involved the element of sale or negotiated sale.

As regards Amran, there is not a thread of evidence that he had in any way participated in any of the two negotiations or was in any way or manner concerned with the sale of cannabis in this case. Accordingly the facts that Amran existed and was the person who handed over the three months' advanced rental from the 1st respondent to PW7 and received the keys for the house from PW7 are of little relevance to the charge against the respondents having regard to the basis upon which the prosecution preferred its charge, i.e. one of sale.

In the circumstance, the learned trial Judge, in our view, had attached too great an importance to the existence of Amran and to what he did than they duly deserved.

We also find ourselves in agreement with the learned Deputy Public Prosecutor that the learned trial Judge had erred in law when he faulted PW13 the investigating officer for not lifting the finger prints off the wrappings of the cannabis and for not taking photographs of the street light in front of the house No. 129. Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there is evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumes little value or significance.

As to the failure to take photograph of the street lights in relation to the house and to include the lights in the sketch plan, the learned trial Judge took exception to the failure on the ground that these were "vital items to support the prosecution case that the area was lighted that morning during the raid." With respect, the omissions have, in our view, been over-emphasised. The police photographer were at the scene and the sketch plan was drawn on 2 August 1991, i.e. two to three days after the incident. At best the photograph, if taken, and the lights, if incorporated in the sketch, would merely indicate the existence of the lighting facilities at the time of photographing rather than the situation that the area was actually lit at the material time of the alleged offence. In any event what really mattered were the events taking place inside the house and not outside it. The respondents, it will be recalled, were caught together with the cannabis in question and had unsuccessfully attempted to flee: the 1st respondent's attempt was thwarted by PW9 barely before he started whilst the 2nd respondent managed to make it only to the door. The intention to flee when considered in the light of the evidence of the "sale" immediately preceding it, justifiably necessitate some explanation from the respondents. This incidentally disposes of ground five of the appeal.

In relation to the use of the exculpatory statement of the 1st respondent (D25), we note that the learned trial Judge had used the statement to conclude that Amran occupied room "K" in the house. Learned Counsel for the 1st respondent had also submitted before us that the 1st respondent's statement D25 showed that he (the 1st respondent) did not negotiate nor did he ask the 2nd respondent to buy the cannabis. With respect, we are of the view that the approach is wrong. A purely exculpatory or self-serving statement is not evidence of the facts stated though it may be admitted to show the reaction or attitude of the accused at the time when he made it. And, in considering whether there is a case to answer, the trial Judge ought not take into account such a statement as the basis for founding an order of acquittal and discharge. *PP v. Adetunji Adeleye Sule* [1993] 4 CLJ 173; [1993] 1 AMR 24 SC is a

case involving presumption under s. 37(1)(d) and (da) of the Act by reason of the accused being in manual possession of the trunk in which heroin was found. The Supreme Court set aside the order of discharge and acquittal made by the trial Judge at the end of the case for the prosecution. Delivering the judgment of the Court, Edgar Joseph Jr. SCJ after expressing that the conduct and demeanour of an accused should not by themselves be sufficient to rebut a statutory presumption that had arisen against the accused, said: (p. 995)

> In the same way, in a case where the onus lies on an accused to rebut a statutory presumption, a voluntary out of Court statement by the accused – and this would include a cautioned statement – which is wholly exculpatory should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution since, at that stage, the accused not having given evidence himself, his explanation could not be tested by cross-examination.

In the Singapore case of *PP v. Chan Kim Choi* [1989] 1 MLJ 404 Coomaraswamy J, speaking of the evidential status of exculpatory or self-serving statements, said: (p. 413)

> They are admissible on the ground, as the Privy Council has put it, that, "common fairness requires that the entirety of the statement should be admitted so as to show the precise context in which the admission was made." ... What he says in order to exculpate himself cannot be admissible as the truth because it is self-serving and also because it is not necessarily consistent with other facts that may be established by the prosecution in the course of the trial.

Although the conviction of murder in *Chan Kim Choi* case, *supra*, was set aside on appeal for a lesser offence of culpable homicide not amounting to murder for a different reason, (see *Chan Kim Choi v. PP* [1991] 1 MLJ 260 CCA) the exposition of law on exculpatory statements was accepted. Of particular relevance to our present case is the affirmation of case to answer Lai Kew Chai J, delivering the judgment of the Court, said: (p. 263)

> The trial Judges called for the defence. This we think was entirely proper.

Shortly thereafter, he went on: (pp. 263-264)

> We should now refer to an astonishing submission made by former Counsel of the appellant. In contending that there was no case to meet, he submitted that the explanations of the appellant given by the appellant in his voluntary statement should be accepted as true on the ground that the voluntary statement had been tendered by the prosecution as part of its case against the appellant. This extravagant submission not unexpectedly received short shrift from the trial Judges. They ruled that it was not the law in Singapore that exculpatory statements in a confession used by the prosecution as part of its evidence were admissible as evidence of the truth of the contents thereof. That ruling was patently correct.

In *R v. Storey* [1968] 52 Cr. App. R. 334 CA, the police found a large quantity of cannabis resin in the defendant Miss Storey's flat. In the voluntary unsworn statement to the police, she said that the cannabis resin belonged to an Indian man called Ali who brought it into her flat against her will. Her explanation, if true, would have proved that she was never in possession of the cannabis resin. At the close of the case for the prosecution, the defence submitted that there was no case to answer. The trial Judge overruled the submission and called for the defence. On appeal, the Court of Appeal (English Criminal Division) upheld the trial Judge's ruling, holding that the defendant's statement to the police was not evidence of the truth of the facts therein, but only of her reaction to the police enquiries, and the defendant's unsworn statement did not nullify the evidence of possession suggested by the presence of the cannabis resin in her flat. In his judgment, Widgery LJ said: (pp. 337-338.)

> The question which arises in this case is whether the fact that she gave shortly afterwards an explanation which, if true, would provide a completely innocent explanation is enough to produce a situation in which the learned Judge's duty was to say that there was no case to answer.
>
> The Court has given careful consideration to this important point. We think it right to recognise that a statement made by the accused to the police, although it always forms evidence in the case against him, is not in itself evidence of the truth of the facts stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial.
>
> Accordingly, in our judgment, in this case the fact that the cannabis was on the applicant's bed in her flat was in itself some evidence of possession to go the jury. Her unsworn explanation, although, if true, it would have been a complete answer to the charge, did not cancel out or nullify the evidence which was provided by the presence of the cannabis. It was ultimately for the jury to decide whether that explanation was or might be true, and it was not for the Judge necessarily to accept it at the stage when he was considering the submission. In the event therefore, we have come to the conclusion that the learned Judge was entitled to and right to leave this matter to the jury and not to withdraw it from them merely because the accused's unsworn explanation would, if true, have been a complete answer to the charge.

Of course, we, in Malaysia, no longer use the jury system. The trial Judge has to play the role of a decider of law and of fact at the close of the

prosecution case, and where the defence is called. Nevertheless, the principles of law relating to the effect of exculpatory statement remain the same.

We now come to the 4th ground.

The learned trial Judge invoked adverse presumptions under s. 114(g) of the Evidence Act 1950 for the non-calling of the informer, Cholar, and the co-occupier of the premises, Amran, by the prosecution as witnesses and for failing to offer them to the defence at the close of the prosecution case. His reason for doing so was based on his finding of fact that Cholar's role was not just an informer but was an active participant in the circumstances leading to the commission of the offence because he not only introduced PW9 to the 2nd respondent but was also present during the subsequent transactions involving the one kati and one kilo of cannabis. Before us, it was submitted for the respondents that Cholar as an informer had turned into an agent provocateur, *Namasiyiam and Others v. PP* [1987] 2 MLJ 337 was cited in support.

The Act does not define "informer" and "agent provocateur". But the distinction is recognised. (See ss. 40 and 40A of the Act).

In *Munusamy v. PP* [1987] 1 MLJ 492 Mohd. Azmi SCJ in delivering the judgment of the Court opined that "whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case." (p. 494). In our instant case under appeal, though Cholar introduced PW9 to the 2nd respondent and was present when both transactions involving cannabis were struck, there is no evidence that he had done anything apart from being present. It appears obvious that his presence during the negotiation process and the transactions was merely to lend credence to PW9's intention to purchase the cannabis in the minds of the respondents. In *Namasiyiam and Others v. PP* [1987] 2 MLJ 336, the judgment shows that Francis, the 'informer' (as the police called him throughout the trial) took an active part not only by introducing the agent provocateur to the offenders but also acted as the latter's spokesman and participated in the trap leading to the arrests of the offenders and the seizure of the drugs.

On the particular facts and circumstances of the instant case under appeal, we are of the view that Cholar was not an agent provocateur. But even if he was, there is more than sufficient credible evidence of the respondent's involvement in the negotiation and agreement to sell to PW9 the 902 grammes of cannabis subsequently brought out by the 2nd respondent from room K in the said house.

In the case of Amran, the learned trial Judge relied on the evidence that Amran handed the 1st respondent's rental in advance to PW7 and received the keys

of the house from PW7. The trial Judge also relied on the exculpatory statement of the 1st respondent which mentioned about Amran. Evidence adduced shows that Amran had passed the three month advance rental from the 1st respondent to PW7 Azian from whom he received the keys of the house. But this took place on 28 June 1991 – more than one month before the alleged offence. True, in the 1st respondent's exculpatory statement D25, Amran was said to have occupied room 'K' of the house, and the learned trial Judge concluded that Amran had access or occupation of the premises, the fact remains that there is not an iota of evidence that Amran had in any way whatsoever involved or participated in the negotiations or sales of the cannabis in any of the occasions. This is of particular importance in view of the basis of the 'trafficking' charge relied on by the prosecution which was one of sale resulting from negotiations. We are of the view that Amran was not an agent provocateur.

Much had been canvassed before us respecting the drawing of adverse inference under s. 114(g) of the Evidence Act 1950 from the non-calling of Cholar and Amran. Whether or not such an inference should be drawn is not a matter of an inflexible rule but depends upon the circumstances of each particular case. In determining this issue, the question to consider is whether the existence of a fact or a state of things (i.e. Cholar introducing PW9 and was present the meetings; Amran staying in room 'K') makes the existence of another fact or state of things so likely that it may be presumed to exist. The answer must naturally vary according to the circumstances, the nature of the fact required to be proved and its importance in the controversy, the usual and commonly recognised mode proving it, the nature, quality and cogency of the evidence which had not been produced and its accessibility to the party concerned.

In our instant case under appeal, there can be no doubt that the basis of the prosecution's case to substantiate the charge is on sale of the cannabis resulting from negotiation. There is ample evidence of direct negotiation between PW9 and the 1st respondent, and the carrying of the cannabis from room "K" by the 2nd respondent at the behest of the 1st respondent. On that basis, and given the roles played by Cholar and Amran as reflected from the evidence adduced, it is difficult to see how the two of them can be material to the point in issue i.e. sale through negotiation. Furthermore, the materials on record do not in any way suggest that the prosecution had withheld them with ulterior motives. We do not think any adverse inference should be drawn against the prosecution for the non-production of them, at least at this stage of the trial.

We have considered the submissions by Counsel for both sides and the evidence adduced by the prosecution. As submitted by the learned Deputy Public Prosecutor, it was the case of the prosecution that the "trafficking"

took the form of negotiation for sale and the sale of the cannabis. There is ample evidence of the negotiation leading to the agreement for the sale of the cannabis at RM1,500 per kilo between the 1st respondent and PW9. The role of the 2nd respondent included the bringing and introducing PW9 to the 1st respondent with full knowledge of the purpose which was for the sale of ganja and the bringing of the ganja from a room in the said house. Having regard to the definition of "trafficking" and the evidence adduced including the evidence of sale, we are unanimously of the view that the non-calling of Cholar and Amran does not affect the success of the prosecution at the conclusion of its case in establishing a case under s. 180 of the Criminal Procedure Code, that a case under the said s. 180 against both respondents has been made out, and that this is so even if the more stringent test of 'proof beyond reasonable doubt' as propounded in *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597 were to be applied. Accordingly the appeal is allowed. The orders of discharge and acquittal are set aside. The case be remitted to the High Court at Taiping before the same trial Judge for continuation of the trial and the two respondents be called to enter upon their defence. Both respondents are to be remanded in prison until trial.

Reported by Tey Tsun Hang &
Gan Peng Chiang